S. R. A.—Chem. Suppl. 49. Issued May 23, 1918.

United States Department of Agriculture,

BUREAU OF CHEMISTRY.

C. L. ALSBERG, Chief of Bureau.

SERVICE AND REGULATORY ANNOUNCEMENTS.

SUPPLEMENT.

N. J. 5901–5950.

[Approved by the Acting Secretary of Agriculture, Washington, D. C., May 10, 1918.]

NOTICES OF JUDGMENT UNDER THE FOOD AND DRUGS ACT.

[Given pursuant to section 4 of the Food and Drugs Act.]

5901. Misbranding of "Dr. Biggers' Huckleberry Cordial Compound." U. S. * * * v. Haltiwanger-Taylor Drug Co., a corporation. Tried to the court and a jury. Verdict of guilty. Fine, $25. (F. & D. No. 7653. I. S. No. 2396–l.)

On October 14, 1916, the United States attorney for the Northern District of Georgia, acting upon a report by the Secretary of Agriculture, filed in the District Court of the United States for said district an information against the Haltiwanger-Taylor Drug Co., a corporation, Atlanta, Ga., alleging shipment by said company, in violation of the Food and Drugs Act, as amended, on or about March 2, 1916, from the State of Georgia into the State of Florida, of a quantity of an article labeled in part, "Dr. Biggers' Huckleberry Cordial Compound," which was misbranded.

Analysis of a sample of the article by the Bureau of Chemistry of this department showed the following results:

Rhubarb (emodin test): Positive.

Total solids (grams per 100 cc)	38.22
Alcohol (per cent by volume)	2.54
Ash (grams per 100 cc)	1.33
Reducing sugars before inversion (grams per 100 cc)	3.19
Reducing sugars after inversion (grams per 100 cc)	36.40
Sucrose by reduction (grams per 100 cc)	34.94
Morhpine (gram per 100 cc)	0.075

Camphor: Present.

Gelsemium: Indicated.

Glycerin and heavy metals: Absent.

The above analysis indicates the absence of any substantial amount of huckleberry product.

It was alleged in substance in the information that the article was misbranded for the reason that certain statements appearing on the label of the carton falsely and fraudulently represented it as a remedy for children teething, cholera morbus, dysentery, and all affections of the bowels, when, in truth and in fact, it was not.

Misbranding was alleged for the further reason that the statement regarding the article and the ingredients and substances contained therein, appearing on its label, to wit, "Huckleberry Cordial Compound," was false and misleading in that it indicated to purchasers thereof that the article contained a substantial and significant amount of a product produced from huckleberries, when, in truth and in fact, it did not: and for the further reason that the statement regarding the article and the ingredients and substances contained therein, appearing on the label, to wit, "Alcohol 10%," was false and misleading in that it indicated to purchasers thereof that said article contained 10 per cent of alcohol, when, in truth and in fact, it did not contain 10 per cent of alcohol, but did contain a less amount thereof, to wit, 2.54 per cent.

On April 4, 1917, the case having come on for trial to the court and a jury, after the submission of evidence and arguments by counsel, the following charge was delivered to the jury by the court (Newman, *D. J.*)

Gentlemen of the jury, the first count in this indictment, which you have heard read, which is found under what is called the Food and Drugs Act, sets out, in the first place what is on the labels on these packages and then it says what is on the carton and what is on the bottles. It says that these statements "were false and fraudulent in this, that the same were applied to said article knowingly, and in reckless and wanton disregard of their truth or falsity, so as to represent falsely and fraudulently to the purchaser thereof, and to create in the minds of purchasers thereof the impression and belief, that it was, in whole or in part, composed of, or contained ingredients or medical agents effective, among other things, as a remedy for children teething, cholera morbus, dysentery, and all affections of the bowels, when, in truth and in fact, said article was not, in whole or in part, composed of, and did not contain, ingredients or medicinal agents effective, among other things, as a remedy for children teething, cholera morbus, dysentery, or all affections of the bowels; all of which was and is contrary to the statute."

That raises the question here. It is perfectly clear that if they represented it, as this says, on the cartons and on the labels and on the literature accompanying this preparation and put on it these statements and knew them to be false, they would be guilty under this first count in the indictment. As to its effect on children teething and curing cholera morbus, if they knew, or more than that, if they made them so recklessly as to their truthfulness as to amount to willful fraud or so recklessly, in the language of the district attorney here, who has given a request on the subject, which is correct, if it appears from the evidence, beyond a reasonable doubt, that such statement was made either with knowledge that it was not true, or in reckless and wanton disregard of the truth, that it amounts to willfulness, where it was so recklessly and so wantonly made without ascertaining the truth, it would really amount to willfulness, it would be the same as if they knew it, whether they knew it or not. If you believe that in this case and are satisfied beyond a reasonable doubt as to these labels and the statements as to the remedial effect of this preparation and the curative effect, they would be guilty on this questiton, on that count of the indictment and on that branch of the case. Whether he made them believing them to be true, made them honestly and in good faith, and whether he made them knowing them to be not true or so recklessly or wantonly as to their truth as to amount to untruth, and consequently a fraudulent representation as to what was contained in it; that is the question on the first count in the indictment, which you will see, when you read it, recites.

Mr. Westmoreland. Your honor failed to state to the jury that it not only must be false but fraudulent.

The Court. I assumed that to be true.

You would have to believe them to be false as well as fraudulent. I was giving the fraudulent character of it. Of course if the statements made on these things are true then there would be no case against them at all, but if you [believe] that they are untrue, they must be false and fraudulent, and if fraudulent, made with intent to deceive or with such reckless disregard of truth and he should know that it would deceive the public. As to the character of the representation made, of course it must be both false and fraudulent, and it must be untrue. If these statements were not untrue there would be no case here at all, of course.

Now, the second count in the indictment deals with the statement as to the amount of alcohol in it. Now in respect to this I instruct you, the only thing I have heard here in connection with this case which seems to me would excuse him, if this quantity of alcohol was misrepresented, is his statement as shown by these calculations he made about the quantity of alcohol in this grape brandy which he was using. I do not believe that would excuse him. I believe the question is whether he materially misrepresented in his label the quantity of alcohol in there. The statute provides that "if the contents of the package as originally put up shall have been removed, in whole or in part, and other contents shall have been placed in same package, or if the package fails to bear a statement on the label of the quantity or proportion of any alcohol (among other things) contained therein." Now, I think the statement as to the amount of alcohol in one of these packages of medicine must be substantially correct. You have the evidence about that here and if you believe it is incorrect, I believe on that part of the indictment he would be guilty if there was a material difference under the evidence, or in your opinion from the evidence, between the amount of alcohol stated on the package and the amount contained in the package, I think on that he would be guilty. I think the law holds him absolutely and arbitrarily to stating, with substantial correctness, the amount of alcohol in the package. If he has not done that, as charged in the second count in the indictment, he would be guilty as to that part of it.

Now, the next thing is the use of the words "Huckleberry Cordial" and as to its being a preparation coming from the roots of the huckleberry instead of the berry itself. That is a question, I think, for you to determine, gentlemen. It is largely in your discretion under the evidence. That is, whether or not using a mixture of the root, which he used here, of the huckleberry root, as he says, would be an imposition upon the public, because, as the contention of the case is here, that means the extract or what is squeezed out of the huckleberry itself; that that is the impression it would make on the public. If he knew that or understood that, or if he had good reason to believe that it would create that impression on the public, that it was an extract extracted from the huckleberry itself, and he used an extract from the root, that would be a reason to convict him under the second count. If old Dr. Biggers and this defendant believed the extract of huckleberry root was, over long years, satisfactory to the public for use in making huckleberry cordial, I do not believe he should be convicted on that, but if its use was to make the public believe that it was taken from the huckleberry itself when in fact it was taken from the root, he would be guilty under that head. Both that and the alcohol are in the second count in the indictment; they are both charged. If you find him guilty on either of those two things, the alcohol or the huckleberry cordial, and it is alleged that that name was used to lead the public to believe that it was real huckleberry cordial, made from huckleberries themselves, and was intended to convey that impression. If that was true, that would be a misrepresentation for which he ought to be convicted here. On the other hand, if they truly believed and had a right to believe that an extract from the root was not a thing that would impose on the public and that it was an assistant in the way in which he used it as an astringent, if he believed that it was fairly represented to the public or had good reason to believe that it was fairly represented to the public as huckleberry cordial, then he ought not to be convicted.

Those two things and the remedial qualities of the medicine, whether or not that was a false—the statements made about that, were they both false and fraudulent, as I have stated to you. You will have to believe that, and as to the alcohol, you will find from the evidence here whether there was a material, substantial difference between the amount of alcohol in the medicine or

in this preparation and the amount put on the label, and as to the huckleberry root I have already instructed you.

Now, if you do not believe him guilty on either of these counts, say you find him not guilty. If you believe him guilty on both counts, say you find him guilty. If you believe him guilty on one count and not on the other, so express it in your verdict. You should be satisfied of his guilt beyond a reasonable doubt.

Some evidence has been offered about the good character of the defendant. That goes to the jury to be considered with the evidence in the case, and particularly on the question of intent to do right. It is said that good character, if thoroughly established, is sufficient of itself, in a proper case, to raise a reasonable doubt. It is for you to say whether or not that is true in this case.

Mr. WESTMORELAND. If your honor please, the second count contains two subjects, and if the jury should come to the conclusion, under your honor's charge, that the defendant should be guilty of mislabeling as to the alcohol and not as to the other, should they not specify in the verdict as to which?

The COURT. What do you say, Mr. Alexander, I think so?

Mr. ALEXANDER. Whatever your honor thinks about that.

The COURT. I think so, gentlemen.

Mr. ALEXANDER. There is one matter that your honor has not discussed. Aside from the matter of the huckleberry being made from the root, the cordial, I think the issue in the case is this: That even though they think that the root or extract from the root can justify the use of the words, "Huckleberry Cordial," that that name can not be used when it is insignificant in amount; if that particular item should be there in insignificant quantities that it would be misleading, under the statute, to give it that distinctive name.

The COURT. I do not think so, Mr. Alexander; I have considered that.

The jury thereupon retired, and after due deliberation returned a verdict as follows: "We, the jury, find the defendant guilty of misbranding as to the amount of alcohol under the second count of the indictment." Thereafter, on April 5, 1917, the court imposed a fine of $25.

C. F. MARVIN, *Acting Secretary of Agriculture.*